United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6075

To be argued by
DAVID SCHOENBROD

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-6075

NATURAL RESOURCES DEFENSE COUNCIL, INC.; NEW YORK ASSOCIATION FOR BRAIN INJURED CHILDREN; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; ENVIRONMENTAL ACTION COALITION; FRIENDS OF THE EARTH; HIGHWAY ACTION COALITION; NATIONAL WELFARE RIGHTS ORGANIZATION,

Plaintiffs-Appellees,

—v.—

RUSSELL TRAIN, as Administrator of the U.S. ENVIRONMENTAL PROTECTION AGENCY; and the U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLEES

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Dated: New York, New York
August 19, 1976

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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* Cases or authorities chiefly relied upon are marked by asterisks.

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS CITATIONS

I. INTRODUCTION

In passing the Clean Air Act Amendments of 1970, Congress made the protection of public health a national priority. In particular, it demonstrated special concern for the control of those harmful pollutants which are widespread. Sections 108-110 of the Act provide for the setting and attainment of health protection standards, under a strict timetable, for each air pollutant which "has an adverse effect on public health and welfare" and "results from numerous or diverse mobile or stationary sources."

The Administrator of the Environmental Protection Agency ("EPA") concedes that airborne lead satisfies these criteria. Nevertheless, he claims the authority to dispense with these health protection procedures, and he has refused to list lead under Section 108(a)(1) and promulgate an ambient air standard for the protection of public health.

The Administrator attempts to justify this inaction by the bald assertion that the procedures for setting and achieving health protection standards are merely one "strategy" among many in the Act. He is unable to point to anything in the language or legislative history of the Act which supports this notion, however. In fact, the structure of the Act and its legislative history demonstrate that these procedures are the central features of the public health protection scheme envisioned by Congress, and Congress considered them mandatory for the control of harmful and widespread pollutants such as lead.

Section 108(a)(1) unmistakably conveys this intent.

It provides that the Administrator "shall" publish a list which includes "each air pollutant" which is harmful and originates in numerous or diverse sources. The Administrator argues, nevertheless, that a brief concluding phrase in sub-section (C) of Section 108(a)(1), which refers to the Administrator's plans to issue air quality criteria at the Act's passage, provides the "open sesame" for the exercise of his discretion.

The irony of this argument is that this "plain meaning" is contrary to the "plain meaning" which the Administrator originally found expressed in Section 108(a)(1), immediately after the Act's passage. At that time, he construed the listing of pollutants under Section 108(a)(1) as mandatory. In fact, as plaintiffs will show, sub-section (C) is compatible with the Administrator's original reading of the provision.

In all events, the Administrator's present interpretation would sacrifice the meaning of this entire provision and others, for the sake of his conception of semantic neatness. The mandatory language concerning the listing of pollutants in Section 108(a)(1) and the carefully ordered, strict timetable in Sections 108-110 are simply idle gestures, if the Administrator is free to initiate this process or refrain therefrom, as he chooses, whenever he chooses.

The District Court held that this construction "would comport with neither the clear legislative intent to have strict mandatory health procedures in effect by mid-1976 nor the language of the Act itself." Slip Opinion at 7. Plaintiffs submit that this decision should be affirmed.

II. STATEMENT OF THE CASE

A. The Health Effects of Airborne Lead Pollution

EPA does not dispute the serious impact of lead pollution upon public health.[1/] The highest concentrations of lead in urban areas come from vehicular traffic. One hundred million vehicles, using gasoline with lead additives, emit over one-third billion pounds of lead each year. In addition, extremely high levels of lead in the air and dust are produced on a localized basis from stationary sources. For example, in 1970 smelters and factories emitted an additional thirty-six million pounds of lead into the air. Airborne lead thus contaminates the air we breathe, the water and food we consume, and the dust and dirt of the city settings in which our children play.

Lead is a harmful substance for which the human body has no known use. Its harmful effects are not limited to the period of exposure since the body accumulates lead and lead may cause life-long medical problems.[2/] Lead poisoning results in death or severe illness, including irreversible brain damage.

1/ Except where noted, the information in this section was drawn from Plaintiffs' Statement of Material Facts as to Which There Are No Germane Issues of Fact to be Tried ¶¶ 11, 22-26 [Joint Appendix of Plaintiffs-Appellees and Defendants-Appellants (hereinafter "App.") at 95,96,98,99].

2/ Finberg Aff. at ¶ 11 [App. at 46].

Even low-level exposure to lead which is insufficient to cause overt symptoms may alter vital bodily functions, such as the production of hemoglobin. Such exposure has been associated with subtle damage to the nervous system, kidneys, and other body systems.

The impact of lead pollution on children is particularly alarming. In their first three years, children are especially vulnerable to lead pollution because of their lack of brain shielding.[3/] Recent scientific evidence suggests that reductions in motor performance I.Q. in urban children may be associated with blood lead levels.[4/] Other research shows an association between low-level lead exposure and minimal cerebral disfunction, which is estimated to occur in two-million to eight-million children in the United States.[5/] Indeed, one-fourth of the children tested in urban areas had levels of lead in their blood which exceeded acceptable limits, according to EPA.

In Ethyl Corporation v. Environmental Protection Agency, ____F.2d____, 8 ERC 1785 (D.C. Cir. 1976) the Court, sitting en banc, extensively discussed the evidence relating to the health effects of lead pollution, and upheld the Administrator's

3/ Challop Aff. at ¶ 10 [App. at 38].

4/ Id. at ¶ 9 [App. at 37].

5/ David Aff. at ¶ 11. (This page of Dr. David's Affidavit was inadvertently omitted from the Appendix and will be supplied to the Court, under separate cover).

determination that lead emissions "present a significant risk of harm to the health of urban populations, particularly to the health of city children."[6/]

B. The Clean Air Act Amendments of 1970

In the present case, the Administrator concedes that the criteria for the listing of a pollutant under Section 108(a)(1)(A) and (B) are met: airborne lead "in his judgment has an adverse effect on public health and welfare," and its presence "in the ambient air results from numerous or diverse mobile or stationary sources." The sole issue, given these findings, is whether the Administrator may dispense with the listing of lead.

The listing of a pollutant triggers the Act's procedures for setting health protection standards and a time-table for achieving these standards. Once a pollutant is listed under Section 108(a)(1), Section 108(a)(2) requires the Administrator to issue an air quality criteria document for the pollutant. Then, Section 109 requires him to convert these criteria into ambient air quality standards, protective of public health and

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6/ 8 ERC at 1820. The Administrator's determination of lead's health effects, under review in the Ethyl case, was made in November 1973. 8 ERC at 1789. Since then, substantial new evidence of lead's health effects has been found. See, e.g., Landrigan et al., "Neuropsychological Dysfunction in Children With Chronic Low-Lead Absorption." Lancet I: 708 (1975); Burde & Choate, "Early Asymptomatic Lead Exposure and Development at School Age," Journal of Pediatrics 87(4): 638-643 (1975); Lepow, "Investigations into Sources of Lead in the Environment of Urban Children," Envir. Res. 10(3): 415-26 (1975).

welfare. Finally, Section 110 requires that implementation plans be developed for each state, which demonstrate that the ambient air standards for each pollutant will be attained. The Act requires that these steps be carried out according to a strict schedule, in order to ensure attainment of the ambient air standard by a date certain. See Train v. NRDC, 421 U.S. 60 (1975).

The ambient air standards, however, do not in themselves limit the discharge of pollutants but rather constitute "the reference point for the analysis of factors contributing to air pollution and the imposition of control strategies and tactics."[7/] In turn, the Act contemplates that control strategies designed to limit emissions of pollutants will be implemented at both the state and federal levels. Both state and federal control strategies are to be taken into account in the state implementation plan's demonstration that the ambient air standard will be attained by the deadline. See 40 C.F.R. § 51.14(a).

At the federal level, the Administrator is required to set emission limitations for new stationary sources (Section 111) and for new vehicles (Section 202), and he is authorized to regulate fuels and fuel additives to prevent the fouling of emission control devices installed on new vehicles and to protect public health. (Section 211(c)(1)). At the state level, the state implementation plan must contain emission limitations and such other control

7/ S. Rep. No. 1196, 91st Cong., 2d Sess. 11,12 (1970) (hereinafter "Senate Report").

strategies as may be necessary to attain the ambient air standards, including land-use and transportation controls. Section 110(a)(2)(B).

It is important to note that the demanding procedures for setting and attaining ambient air standards apply only to harmful pollutants which originate from numerous or diverse sources. Section 108(a)(1). However, the Act does provide for control of other pollutants which are harmful but not widespread. Section 112 covers pollutants to which no ambient air standard is applicable but which cause death or severe illness. For these "hazardous air pollutants," the Administrator must set emission standards protective of health by a deadline.

The remaining air pollutants which are neither widespread nor "hazardous" (as defined in Section 112) are also subject to the federal control strategies provided in Sections 111,202, and 211(c)(1), but the requirements applicable to these pollutants are far less stringent than the procedures established in Sections 108-110 for harmful pollutants which originate from numerous or diverse sources. Sections 111 and 202 require controls of new stationary and mobile sources, while Section 211(c)(1) allows control of fuels and fuel additives. None of these provisions requires the Administrator to set a national health protection standard as a basis for these controls and to meet that standard by a date certain. In contrast, for pollutants listed under Section 108(a)(1), Section 110 requires that controls over existing stationary sources and vehicles,

NRDC v. EPA, 475 F.2d 968 (D.C. Cir. 1973).[8/]

In sum, the strictness of the procedures applicable to particular pollutants is related to the severity of the problem they present. For widespread pollutants subject to ambient air standards, the Administrator must protect health by a deadline and employ systematic procedures to ensure this result. See e.g., Friends of the Earth v. Carey, ____F.2d____, 8 ERC 1933,1935 (2d Cir. 1976). For hazardous pollutants the Act requires protection of public health by a deadline. For the remaining harmful pollutants which are neither extremely hazardous nor widespread, there is no requirement to establish or attain overall health standards or to reach any particular result by a deadline.

When the Act was passed, air quality criteria had already been issued for certain harmful pollutants which originate from numerous or diverse sources. For these, the Administrator was required to promulgate ambient air standards within 120 days.

8/ Section 111(d) does provide for the development of state plans applicable to existing sources of a pollutant which is not the subject of an ambient air standard. However, in contrast to Section 110(a)(2), a state is not required under Section 111(d) to demonstrate that health will be protected. Nor is there a deadline for achieving any particular result. EPA promulgated regulations under Section 111(d) - almost five years after passage of the Act - which still do not require any action by the states. 40 Fed. Reg. 53340 (Nov. 17, 1975).

Section 211(c), relating to the regulation of fuels and fuel additives, provides a further example of the disparity between the requirements applicable to pollutants which are the subject of ambient air standards and those which are not. Under Section 211(c)(4), the Act preempts state regulation of the same fuel or additive unless such regulation is necessary to achieve an ambient air standard.

Section 109(a)(1). For other such pollutants, Section 108(a)(1) required the Administrator to include them on a list within 30 days of enactment, and to add to the list as additional knowledge concerning air pollutants is acquired. Senate Report at 18,19.

For those pollutants listed under Section 108(a)(1), Congress imposed a "rigorous time sequence" for the attainment of primary ambient air standards - and the protection of public health - by a date certain. See Senate Report at 12. The schedule mandated by Congress is as follows:

December 31, 1970 - Enactment of the Amendments.

January 30, 1971 - Listing of the pollutant, within 30 days of enactment. § 108(a)(1).

January 30, 1972 - Issuance of air quality criteria (§ 108(a)(2)) and publication of a proposed national primary ambient air standard (§ 109(a)(2)), within one year of listing.

April 29, 1972 - Promulgation of final national primary air standard, within 90 days after proposed. § 109(a)(2).

January 29, 1973 - Submission by each state of plan to meet ambient air standard, within 9 months of standard's issuance. § 110(a)(1).

May 29, 1973 - Approval or disapproval of plan by Administrator. § 110(a)(2).

May 29, 1976 - Attainment of the ambient air standard, "as expeditiously as practicable but...in no case later than 3 years from the approval of such plan...." § 110(a)(2)(A)(i).

C. The Administrator's Refusal to Set Health Protection Standards for Airborne Lead

In hearings on the 1970 Amendments, the administration specifically represented to Congress that air quality criteria for lead would be issued early in the succeeding year,[9] and immediately after the Act's passage, EPA did produce a draft of the criteria for lead,[10] for release under Section 108(a)(2). However, lead was omitted from the Administrator's initial list of pollutants under Section 108(a)(1), issued three weeks later. See 36 Fed. Reg. 1515 (1971).

Almost three years later, in response to requests for action from NRDC, the Administrator publicly announced for the first time that he did not intend to establish health protection standards for lead under Sections 108 and 109 of the Act. 38 Fed. Reg. 33734, 33740 (Dec. 6, 1973). Although he stated that EPA would regulate lead emissions under Section 211 of the Act, he asserted that he had discretion to refrain from setting health protection standards under Sections 108 and 109. Id.

9/ Statement of Administrator, Environmental Public Health Service, Public Health Service, HEW, Hearings on S. 3229, 3466, 3546, Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works, 91st Cong., 2d Sess. 196 (1970); Testimony of Administrator, Environmental Public Health Service, Public Health Service, HEW, Hearings on HR. 12934, 14960, 15137, 15192, 15848, and 15847, Before the Subcomm. on Public Health and Welfare of the House Commerce Comm., 91st Cong., 1st & 2d Sess's. 293 (1970) ("We now have our Advisory Committee working on air quality criteria. We expect to come out with criteria next year on lead....").

10/ App. at 97.

Since then, the Administrator's own scientific advisory committee on air quality criteria, has urged him to establish ambient air quality standards for lead. On November 14, 1974, the EPA National Air Quality Criteria Advisory Committee unanimously passed a resolution formally requesting that the Administrator list ambient lead as a pollutant under Section 108 for the purpose of establishing ambient air quality standards for lead. App. at 76,77. In the discussion leading up to this vote, Committee members voiced concern at the slow pace of agency action on ambient lead. The Committee Chairman, Dr. Haagen-Smit, spoke of his concern about the difficulty of protecting the health of young children, in both urban and rural areas, from a pollutant such as ambient lead, which comes from multiple sources, without an ambient air quality standard as a reference point.[11/]

11/ App. at 76. A similar "call to action" has been voiced by the National Academy of Sciences - National Academy of Engineering:

> "This toxic metal [lead] is ubiquitous and increasing in urban communities. Documentation exists citing increases in blood levels and other organs in individuals in urban centers exclusively. Because lead moves through many systems, and tends to be cumulative at all levels of intake, these multiple sources add to the total body burden and increase the potential hazard. This situation requires a serious call to action, such as the establishment of national ambient air quality standards for lead and the reduction of lead in automobile fuel even if it reduces engine efficiency. NAS-NAE, "Man Materials, and Environment: A Report for the National Commission on Materials Policy" (March 1973), p. 76.

III. ARGUMENT

A. The District Court Correctly Decided that Section 108(a)(1) is Mandatory and that the Administrator is Required to List Lead

The District Court held that Section 108(a)(1) imposes a mandatory duty upon the Administrator to list a pollutant once he has determined, as in the case of lead, that it has an adverse effect upon public health and originates from numerous or diverse sources.

Plaintiffs submit that this interpretation is correct for three reasons. First, it maintains the integrity of the procedures which Congress designed to hold the Administrator accountable for the protection of public health from harmful and widespread pollutants. Second, the legislative reports state explicitly and repeatedly that the listing of such pollutants is mandatory. Third, the language of Section 108(a)(1) expresses on its face the mandatory character of the Administrator's responsibility. On the other hand, the Administrator's present interpretation is contrary even to his own initial reading of Section 108(a)(1).

1. The Structure of the Clean Air Act

Congress drafted the Clean Air Amendments of 1970 against the background of years of bureaucratic delay under less pointed clean air legislation. H.R. Rep. No. 1146, 91st Cong.,

2d Sess. 5 (1970); Friends of the Earth v. Carey, ____F.2d____, 8 ERC 1933,1934 (2d Cir. 1976). Resolving to protect public health at last, Congress stocked the Act with "shall's," interrelated deadlines, a citizen suit provision, and other devices to force the Administrator into action. Senate Report at 1-3; Section 304(a)(1).

Under the Act, any harmful pollutant could be subjected to the various control strategies available to the Administrator. However, the tightest duties imposed upon the Administrator by Congress were designed for control of the most important pollutants -- those which are both harmful and widespread. For these pollutants, national health protection standards were required to be set and attained under the procedures established by Sections 108-110. These health protection procedures force the protection of health by a deadline, require a state-by-state accounting to ensure that the goal is reached, and make the Administrator accountable at each stage of the process.

The Administrator, however, escapes this accountability if a pollutant is not listed under Section 108(a)(1), since listing is the trigger to the health protection procedures. In fact, except for the listing of nitrogen dioxide 30 days after the passage of the Clean Air Act, the Administrator has not listed a single pollutant under Section 108(a)(1).

The Administrator attempts to obscure the essential

function of the health protection standards contemplated under Sections 108 and 109, by characterizing them as merely another "strategy" which he is free to employ or not as he chooses. Appellants' Brief at 4.

This argument is based on a fundamental confusion of "ends" and "means." For harmful pollutants from widespread sources, the "ends" or goals envisioned by Congress are the primary ambient air quality standards and the timetable for their attainment. The emission limitations, such as those employed by the Administrator under Section 211 in the case of lead, are the "means" for achieving these "ends." 12/

The Senate Report, for example, notes that the ambient air quality standards are "the reference point for the analysis of factors contributing to air pollution and the imposition of control strategy and tactics." Senate Report at 11,12. In Train v. NRDC, 421 U.S. 60 (1975), the Court stated that emission limitations "are the specific rules to which

12/ Accordingly, in South Terminal Corp.v. EPA, 504 F.2d 646,655 (1st Cir. 1974), when the Court stated that "Congress lodged with EPA, not the Courts, the discretion to choose among alternative strategies," it was referring to the control strategies in a federally imposed implementation plan. The Court did not suggest that the Administrator has the discretion to refrain from setting health protection standards, as the Administrator implies. Appellants' Brief at 22.

operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards." 421 U.S. at 78. It further distinguished between EPA's responsibility for setting these national standards and its secondary role in the process of determining and enforcing state emission limitations. Based thereon, the Court held that a state may adopt whatever mix of emission limitations it desires, so long as the effect is compliance with the national standards. The basic premise of this decision is the distinction between the "standards" required to be set under Sections 108 and 109 and the "emission limitations" for achieving those standards. See also Union Electric Co. v. EPA, 96 S. Ct. 2518,2530 (1976).

By confusing the "ends" and the "means," EPA obscures the fact that its interpretation would allow the Administrator - by the simple expedient of not listing pollutants under Section 108(a)(1) - to abandon the fundamental policy, declared by Congress, that public health should be protected from such pollutants, at all cost. If the Administrator is free to refrain from listing pollutants at will, he can free himself from the requirements of Sections 109 and 110 to set and achieve ambient air standards on the basis of the need to protect health; he can dispense with the "rigorous" timetable for health protection; and he need not conduct any state-by-state examination to ensure that the control strategies are adequate to attain and maintain a level of air quality.

These provisions are, however, central in the legislative scheme, as emphasized most recently by the Supreme Court in Union Electric Co. v. EPA, 96 S. Ct. 2518 (1976). Mr. Justice Powell, in his concurring opinion, stated that "Congress properly has made protection of public health its paramount consideration" in the Clean Air Act (96 S. Ct. at 2532), and the majority opinion characterized the procedure established for the setting and attainment of the national primary ambient air quality standards, as "[t]he heart of the Amendments." 96 S. Ct. at 2522. Elsewhere, the Court emphasized that "Section 110(a)(2)(A)'s three-year deadline for achieving primary ambient air quality standards is central to the Amendments' regulatory scheme...." 96 S. Ct. at 2526.[13/]

The health protection procedures in Sections 108-110 cannot, therefore, be characterized as merely another "strategy". They are the central features of the Act. By his refusal to comply with these provisions in the case of lead, the Administrator has never defined what is required to protect the public from

13/ In Union Electric, the Court held that the Administrator did not have discretion to consider the economic or technological feasibility of a state implementation plan's sulfur dioxide emission limits, in his review of the plan, because such factors were not among the criteria set forth in Section 110 of the Act. If his discretion under the health protection procedures of Sections 108-110 is limited in this fundamental respect once a pollutant has been listed, what logic can there be in the Administrator's notion that he has unbridled discretion to determine whether to initiate these procedures in the first place?

airborne lead pollution. Without a primary ambient air quality standard for lead, the Administrator lacks the essential standard or objective for the design and implementation of emission limitations necessary to protect public health. Accordingly when Deputy EPA Administrator John Quarles was asked at the Senate Commerce Hearings whether current lead-in-gasoline regulations were adequate to protect health, he could only state: "I guess the answer has to be 'I don't know'."[14/]

Moreover, by failing to list lead under Section 108, the Administrator has bypassed entirely the strict deadlines in the Act for the achievement of air quality and the protection of public health. The Act mandated that the primary ambient air quality standards be met by mid-1976. As discussed infra at pages 29 and 30, even if it were assumed arguendo that EPA's lead-in-gasoline regulations were adequate to protect public health, they are not designed to take full effect until 1979. EPA's position on lead has therefore entirely undercut the evident intent of the 1970 Amendments that health protection standards for such a pollutant be set by the Administrator and achieved by a date certain.

14/ Hearings on Regulation of EPA to Limit Lead in Gasoline, Subcomm. on the Environment of the Senate Commerce Committee at 41 (Tr. Nov. 29, 1973).

2. The Legislative History

In view of the pivotal role played by the health protection standards contemplated under Sections 108 and 109, it is not surprising that Congress considered their promulgation mandatory for each pollutant which the Administrator determined adversely affects public health and which originates from numerous or diverse sources. The legislative reports are replete with declarations of this intent.

For example, the Senate Report, in its analysis of Section 108 (then designated Section 109), states that "[p]ollution agents which would be subject to the provisions of this section would be those which are emitted from widely distributed pollution sources and generally present in the ambient air in all areas of the Nation." Senate Report at 9. It further states that Section 108 "would require acceleration of the issuance of air quality criteria...." Id. (emphasis added). Elsewhere the Report states that Section 108 "directs the Secretary to publish (initially thirty days after enactment) a list of air pollution agents or combination thereof for which air quality criteria will be issued." Id. at 54 (emphasis added). The message is again repeated:

> "The agents on the initial list must include all those pollution agents or combination of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile and stationary sources, and all those for which air quality criteria are planned." Id. (emphasis added)

In the same fashion, the Conference Report states that the Senate amendment (which the conference substantially adopted) "proposed to establish a deadline by which criteria for certain pollutants would have to be issued..."[15/] Finally, in the Senate debate thereafter, Senator Muskie presented a summary of the conference agreement on the bill which stated, concerning Section 108, that "[t]he agreement requires issuance of remaining air quality criteria for major pollutants within 13 months of date of enactment."[16/]

In the main, the Administrator simply ignores these clear expressions of intent in the legislative history of the Act. Rather, he notes that the Clean Air Act of 1963, as amended in 1967, vested in the Secretary of Health, Education and Welfare, the discretion to determine whether to issue criteria for air pollutants, and argues that there is nothing in the language or legislative history of the 1970 Amendments which reflects a determination to deprive the Secretary of this discretion. On the contrary, the Senate and Conference Reports are replete with statements, cited above, that the amendments "would require" and "direct" the federal administrator to list certain types of pollutants and issue air quality criteria therefor.

15/ Senate Comm. on Public Works, 93d Cong.,2d Sess., A Legislative History of the Clean Air Amendments of 1970 194 (Comm. Print 1974) (emphasis added).

16/ Id. at 130 (emphasis added).

In the face of such evidence the Administrator pretends that Congress sought to maintain the status quo in a statute in fact designed specifically to overcome bureaucratic sloth. He suggests that the only pertinent changes wrought by the 1970 Amendments were the shifting of responsibility for the promulgation of ambient air quality standards from the states to the federal government and the establishment of a time deadline for the issuance of such standards. Even if these were the only changes, they would be stripped of their significance if it is assumed that the Administrator of EPA has unrestricted discretion to refrain from listing pollutants or to bypass or manipulate the timetable by withholding or deferring listings.

In addition to tightening the procedures for establishing air quality standards, however, Congress also narrowed the category of pollutants which were subject to these special procedures. Under Section 107(b)(1) of the prior law, the Secretary had broad discretion to determine, apparently as a matter of policy, whether air quality criteria for any pollutants "in his judgment may be requisite for the protection of the public health and welfare." Under Section 108(a)(1) of the Amendments, air quality criteria are applicable only to widespread pollutants and the federal Administrator's formerly broad discretion was narrowed to an essentially factual determination of whether "in his judgment [an air pollutant] has an adverse effect on public health or welfare" as a predicate to its listing and the issuance of air quality criteria.

It is also clear that Congress specifically intended that lead be included on the initial list under Section 108(a)(2). As previously noted, in hearings on the Clean Air Act, Congress was specifically advised that the administration planned to issue criteria for lead early in the succeeding year. Accordingly, in its analysis of Section 108, the Senate Report expressly states that the Act would require that lead be listed thereunder:

> "Air quality criteria for five pollution agents have already been issued (sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants). Other contaminants of broad national impact include fluorides, nitrogen oxides, polynuclear organic matter, lead, and odors. Others may be added to this group as knowledge increases. This bill would require that air quality criteria for these and other pollutants be issued within 13 months from enactment." Senate Report at 9 (emphasis added).

Elsewhere, the Report states that the pollutants for which proposed national air quality standards would be issued subsequent to enactment "would include nitrogen oxides, lead, ..." Id. at 11.

3. The Language of Section 108(a)(1)

The mandatory character of Section 108(a)(1) is also clearly reflected in its language. It provides that "the Administrator shall within thirty days...publish....a list which includes each air pollutant...." which meets certain criteria. (emphasis added). Indeed, the term "shall" is consistently employed throughout Section 108, with the single exception of sub-section 108(b)(2), which provides that the Administrator "may" establish a standing consulting committee for each air pollutant included in the list.

Use of the term "shall" has been construed to impose a mandatory duty in a number of cases interpreting provisions of the Clean Air Act. See Union Electric v. EPA, 96 S. Ct. 2518,2525 (1976) ("The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified...."); Hancock v. Train, 96 S. Ct. 2006,2020 (1976). This construction is particularly appropriate when "shall" and "may" are juxtaposed in a provision, as they are in Section 108. See,e.g., Wisconsin's Environmental Decade v. Wisconsin Power & Light Co., 395 F. Supp. 313 (W.D. Wisc. 1975) (interpreting Section 113 of the Clean Air Act).[17/]

In fact, Section 108 has been so construed by the Court of Appeals for the District of Columbia in Ethyl Corporation v. EPA, ____F.2d____, 8 ERC 1785 (1976) (dictum). In that case, the Court stated that Sections 108 and 202 are mandatory by reason of their use of "shall." In contrast, the Court pointed to the use of "may" in Section 211 (which the Administrator has relied on for regulation of lead)

17/ The use of the term "shall" has generally been construed to impose a mandatory directive. See, e.g., Stanfield v. Swensen, 381 F.2d 755 (8th Cir. 1967); United States v. Machado, 306 F. Supp. 995 (N.D. Cal. 1969); Pittman Const. Co. v. Housing Authority, 167 F. Supp. 517 (W.D. La. 1958).

and found that provision "permissive." 8 ERC at 1798, n.37.[18/]

The Administrator, argues, however, that Congress seemingly retracted the mandatory character of Section 108(a)(1) when it drafted sub-paragraph (C) thereunder. Under sub-paragraph (C) the air pollutants to be listed by the Administrator include those "for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section." He argues that the reference to "plans"

18/ The Court also noted that the Administrator "appears to have a measure of discretion in determing whether to list a pollutant under § 108, which, by its terms, speaks of the exercise of his 'judgment'," in determining whether a pollutant has adverse health effects. 8 ERC at 1792,1793, n.21. However, that "judgment" has already been exercised in this case by the Administrator's determination that lead does have such effects.

Beyond the decision below and Ethyl Corp. v. EPA, supra, no case has expressly addressed the issue raised herein. In two cases, the courts' summaries of the provisions of the Clean Air Act appear to assume that Section 108 is mandatory and that no discretion is vested in the Administrator by virtue of subparagraph (C). See Indiana and Michigan Electric Co. v. EPA, 509 F.2d 839,841 (7th Cir. 1975) and Kennecott Copper Corp. v. EPA, 462 F.2d 846,847 (D.C. Cir. 1972). Defendants point to an apparently contrary reading in St. Joe Minerals Corp. v. EPA, 508 F.2d 743,744 n.3 (3d Cir. 1975), but the question was not confronted in that case and the decision was recently vacated by the Supreme Court. 96 S. Ct. 2196. Finally, defendants refer to Hancock v. Train, 96 S. Ct. 2006,2008 n.5 (1976), where the Court stated that "EPA is guided in compiling a list of air pollutants by § 108(a)...." This oblique reference, however, scarcely supports either party's interpretation of Section 108.

vests him with discretion to plan or not to plan to issue air quality criteria, as he chooses. He contends that this interpretation is necessary in order to prevent the concluding phrase of sub-paragraph (C) from being rendered "surplusage." Appellants' Brief at 18.

The Administrator's argument for salvaging the meaning of this brief phrase would sacrifice the meaning of the entire provision as well as other sections of the Act. If the determination to list a pollutant and issue air quality criteria is subject to the Administrator's untrammeled discretion, then it is inexplicable why Congress would have provided that the Administrator "shall" issue a list for "each air pollutant" meeting the criteria specified in (A) and (B) of the subsection. Moreover, if the Administrator is free to initiate the health protection procedures, or refrain thereform, then the entirety of Section 108(a)(1), as well as the deadlines of Sections 108(a)(2) and 109(a)(2) which are set off directly by the actual listing, become "surplusage."[19/]

19/ The Administrator also argues, however, Section 108(a)(1) cannot be mandatory because it does not mention specific pollutants, as does Section 202. However, in each and every instance where the statute says that "the Administrator shall" initiate actions against pollutants, it does not enumerate the pollutants, but defines a category of pollutants. See, e.g., §§ 111,112(a), 202(a), 231(a)(2). Section 202 is no exception. Section 202(a) states that:

> "The Administrator shall...prescribe...standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment causes or contributes to,...air pollution which endangers the public health or welfare."

Specific pollutants are mentioned only under Section 202(b), not to indicate which pollutants "shall" be the subject of standards, but to indicate how much emissions as to certain of them must be reduced.

There is, moreover, an obvious meaning to Section 108(a)(1)(C) which does not do violence to the studied use of the word "shall". Section 108(a)(1)(C) seeks to clarify treatment of pollutants that had already been receiving administrative attention. Congress was well aware of the pollutants which were then known to be widespread and harmful,as well as others which might fit into this category as knowledge increased. Senate Report at 18,19. Criteria for some such pollutants had already been issued, while criteria for others, including lead, had been planned, and these plans had been revealed to Congress, as previously discussed.

Section 108(a)(1)(C) distinguished between air quality criteria already issued and those planned. The Administrator was required to proceed within 30 days to publish proposed ambient air quality standards for the former (without the formality of listing), under Section 109(a)(1)(a). On the other hand, 13 months were allowed for the issuance of air quality criteria and proposed ambient air standards for the latter. See Sections 108(a)(2) and 109(a)(2). This is clearly stated by the Senate Report, as quoted supra at page 21.

In fact, while the Administrator argues that he has discretion to determine whether to list a pollutant under the "plain meaning" of Section 108(a)(1), this interpretation is contrary to the "plain meaning" which he assigned the provision shortly after the Act was passed. At that time he construed Section 108(a)(1) as mandatory. 36 Fed. Reg. 1515 (1971).

Whatever meaning is attached to the concluding phrase in sub-section (C), it clearly was not intended by Congress as a"sleight of hand" retraction of the firm mandate in Sections 108-110 to set health protection standards for all harmful and widespread pollutants and to achieve those standards by a date certain. Plaintiffs submit that when the language of the Act, its structure and its legislative history are considered together, the mandatory character of Section 108(a)(1) clearly emerges.[20/]

The Administrator is required to list each air pollutant which in his judgment has an adverse effect on public health and which originates from numerous or diverse sources. It is conceded that lead meets these criteria. Accordingly, the District Court properly held that the Administrator was required to list lead.

B. EPA's Arguments Based Upon Supposed Practical Considerations Provide No Excuse From Compliance With Section 108(a)(1)

The Administrator protests that he refrained from listing lead to avoid practical difficulties. Yet, in another case concerning the Administrator's responsibilities under

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20/ Even if the meaning were as "plain" as the Administrator now believes, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however, clear the words may appear 'on superficial examination'." Train v. Colorado PIRG, 96 S. Ct. 1938,1939 (1976).

Sections 108-110, the Court of Appeals for the District of Columbia Circuit held that arguments based upon good faith and practicality cannot excuse non-compliance with a duty under the Clean Air Act. NRDC v. EPA, 475 F.2d 968 (D.C. Cir. 1973).

The Administrator's arguments are incorrect as well as irrelevant. He argues that "the current state of scientific knowledge" would make it difficult to set an ambient air standard for lead. Appellants' Brief at 22. But, the Senate Report expressly acknowledges that gaps in available scientific knowledge will cause difficulties in developing ambient air standards and concludes that the Administrator must proceed in spite of these difficulties:

> "The Committee is aware that there are many gaps in the available scientific knowledge of the welfare and other environmental effects of air pollution... A great deal of basic research will be needed to determine the long-term air quality goals which are required to protect the public health and welfare from any potential effects of air pollution. In the meantime, the Secretary will be expected to establish such national goals on the basis of the best information available to him." Senate Report at 11 (emphasis added). 21/

21/ Congress endeavored to mitigate these difficulties by requiring that the Administrator conduct continuing reviews and revisions of the criteria and ambient air standards in the light of increasing knowledge (§§ 108(c), 109(b)); and by requiring that the primary ambient air quality standards be established at a level which will allow "an adequate margin of safety, ... requisite to protect the public health." Section 109(b)(1). As the Senate Report stated: "Margins of safety are essential to any health related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified." Senate Report at 10. Accordingly, EPA entirely misconceives the threshhold for action under Section 108, when it attempts to justify its failure to develop health protection standards for lead on the ground that no "precise correlation" is yet possible between airborne lead and blood levels of lead which affect health. Appellants' Brief at 22. The difficulty in making precise correlations was seen by Congress as a reason for requiring "margins of safety" in health protection standards - not as

(cont'd on p.28)

An ambient air standard based upon incomplete knowledge still serves to define explicitly the health goal and to create a benchmark against which to hold the Administrator accountable.

The Administrator also argues that promulgating lead-in-gasoline regulations under Section 211, in lieu of setting ambient air standards, brought the benefits of uniform, federally enforced standards and reduced regulatory burden on the states. Appellants' Brief at 8. Plaintiffs take issue only with EPA's fundamental misconception that these benefits of employing Section 211 and the setting of

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(fn. from p. 27 cont'd)

an excuse for inaction.

EPA argues that lead comes from a variety of sources, in addition to its presence in the ambient air (Id.), but so do many pollutants. The Senate Report suggested a common-sense approach to such problems - take people as you find them, except in extreme cases. Senate Report at 10. In the case of lead, an ambient air standard cannot protect a child already poisoned by lead-based paint, but should take into account exposure to lead in food.

EPA's regulation of lead in gasoline under Section 211 - presumably designed to protect health - will in fact result in a particular ambient air quality. Accordingly, that regulation must explicitly or implicitly, have a target in terms of ambient air quality. Indeed, the administration took the position before Congress that the precise health effects of lead were "unclear," but that it intended to issue air quality criteria for lead. See, e.g., Senate Comm. on Public Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970 1199, 1212,1213 (Comm. Print 1974).

ambient air standards under Sections 108 and 109 are mutually exclusive or incompatible. As discussed supra at pages 14 and 15, EPA has confused the setting of health goals with the means for achieving these goals. If the Administrator had established an ambient air standard for lead, nothing in the Act would preclude the use of a uniform federal regulation under Section 211 to achieve that health goal. In these circumstances, there would be no need for state control of lead additives to gasoline.[22/] In fact, Section 211(c)(4) would prohibit state regulation of lead additives to gasoline, except where more stringent local action is necessary to achieve an ambient air standard.

Therefore, the setting of health protection standards for lead would not interfere with the Administrator's discretion to pursue an appropriate "strategy" for control of airborne lead - except to require that he protect public health by a date certain.

The Administrator suggests that he had moved diligently in regard to lead. Appellants' Brief at 7-11. But, the record shows that EPA has come nowhere close to meeting the applicable health protection deadline for lead of mid-1976.

22/ EPA classifies regions on the basis of the severity of their pollution problem. 40 C.F.R. § 51.3. Where an ambient air standard is achieved through federally imposed emission limitations, the state plan need involve no more than a finding to this effect; no state controls are required. 40 C.F.R. § 51.14.

EPA has relied primarily upon its regulation of lead additives to gasoline.[23/] These regulations do not take full effect until 1979. As a memo from EPA's Department of Planning and Evaluation concluded:

> In effect, these regulations require no reduction in lead content of leaded gasoline in 1975 and 1976; a reduction of half that originally proposed by 1978; and a reduction to 1.25g/gal. [in the leaded grades] by 1979 rather than 1978. A reasonable compromise!" App. at 49.

Even the ambient air level of lead which will be achieved in 1979 by these regulations was earlier determined by EPA to be inadequate to protect public health. App. at 99-101.

EPA's lead-in-gasoline regulation may actually increase airborne lead pollution in some areas directly because the Administrator has not set an ambient air standard. Section 211(c)(4) appears to provide that federal fuel regulation will preempt local ordinances unless they are needed to meet an ambient air standard. New York City and other areas have local ordinances to curb lead additives to gasoline. The Administrator's failure to set an ambient air standard for lead, may thus result in a substantial increase in lead pollution in

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23/ On January 10, 1973, the Administrator promulgated regulations requiring the availability and use of lead free gasoline in vehicles with catalytic converters. 38 Fed. Reg. 1258. However, these regulations did not affect approximately 100,000,000 vehicles on the road without catalytic converters, and EPA took action to affect the lead content of gasoline used by those vehicles only after NRDC and other groups filed a petition for review forcing EPA to take such action. See NRDC v. EPA, (D.C. Cir. No. 72-2233).

New York City.[24/]

The Administrator can point to no direct regulation of lead emissions from stationary sources, but protests that he "may" issue such regulation under Section 111 at some time in the future. Appellants' Brief at 10. It is now almost six years after the passage of the Clean Air Act and almost two years since EPA told the District Court in this case that it "plans" to issue such regulations. App. at 105.

In the meantime, EPA relies upon its regulations of particulate matter, of which lead is a constituent part. Appellants' Brief at 10. EPA admits that it does not know whether this regulatory activity suffices to protect health. App. at 105. It is worth noting that the primary ambient air standard for particulate matter is over 30 times higher than the standard EPA had contemplated for lead. 40 C.F.R. § 50.6(a); App. at 99.

Finally, EPA seems to dismiss the delay in dealing with lead from stationary sources on the basis that stationary sources account for only 10% of airborne lead pollution. Appellants' Brief at 10. But, since this pollution comes from immobile sources that are often large, it can result in extremely dangerous local concentrations. E.g., App. at 56-70, 265-293. According to a 1974 survey by the Idaho Department

24/ See Affidavit of William Shapiro of the New York City Department of Air Resources. App. at 71-73. The City of New York submitted an amicus brief in support of plaintiffs below.

of Health of seven communities surrounding a large stationary source, almost half of the children had blood levels in the range which EPA finds to be unacceptable. App. at 95,285.

Until EPA establishes a more systematic approach to lead pollution, the danger to human health will continue. EPA's own National Air Quality Criteria Advisory Committe, its expert advisory committee on air quality criteria, concluded that it was "not satisfied that the public health and welfare could be adequately protected from any known or undisputed adverse effects of lead associated with the presence of lead in the ambient air without the development of ambient air quality criteria and ambient air quality standards." App. at 294. Despite this warning and previous warnings from the National Academy of Sciences, despite the apparent failure to protect health, and despite the clearly evidenced intentions of Congress, the Administrator has refused to issue the air quality criteria analyzing the known and anticipated risks from lead, or to promulgate ambient air quality standards to make explicit the health goal for lead, or to invoke the procedures of Section 110 that would reveal and abate unhealthy lead levels in every state.

C. Judicial Enforcement of Section 108(a)(1) is Necessary In This Case to Prevent the Agency's Evasion of Congressional Intent

Over 5-1/2 years have elapsed since the passage of the Clean Air Act Amendments of 1970, and the deadline for the attainment of primary ambient air quality standards for harmful and widespread pollutants passed in May of this year. In the case of lead, however, the Administrator of EPA has failed so far even to take the required first step of defining what is required to protect the public health, and, in place of the "rigorous" timetable for attainment of air quality mandated by Congress, he has fashioned his own, more relaxed timetable for achieving reductions in airborne lead levels. Even these reductions will not be adequate to protect public health.

The Administrator apparently believes that he can rewrite the legislation in this manner until there is some dramatic display of Congressional impatience. At the conclusion of his brief, he appears to find solace in the view that lead is not among the "list of pollutants about which Congress appears to be growing impatient...." Appellants' Brief at 28. He cites House Bill, HR. 10498, which directs the Administrator to deal with each of four named pollutants (not including lead) and allegedly grants him "authority" to choose the strategy for control of these pollutants. Based thereon, he argues that Congress has recognized his discretion under Section 108

and by its lack of impatience, has impliedly blessed his failure to list lead.

What the Administrator ignores is that the House Report on HR. 10498 expressly disavows any intent to relieve him of his responsibility for the listing of lead. It also clearly commits the enforcement of Congress' intent in this matter to judicial resolution, and expressly disclaims any intent to affect the decision of the court below in this very case. As the House Report states:

> "Nor does this section affect EPA's authority or duty to regulate any other presently unregulated air pollutant besides the four named pollutants. The use of the word "authority" in subsection (b) of new section 120 is not intended to change existing law or to affect pending litigation respecting control of lead or any other air pollutant. See NRDC v. Train, 74 Civ. 4617 (S.D.N.Y. 1976)." H.R. Rep. No. 1175, 94th Cong., 2d Sess. 26,27 (1976).

It remains, therefore, for this court, to insure that the Administrator properly discharges his responsibility to protect public health from airborne lead in the manner prescribed by Congress and according to Congress' timetable. The Court of Appeals for the District of Columbia Circuit so characterized its function in a case brought under the National Environmental Policy Act:

> "We must assess claims that one of the agencies charged with its administration has failed to live up to the Congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109,1111 (D.C. Cir. 1971).

IV. CONCLUSION

By reason of the foregoing, plaintiffs respectfully submit that this Court should affirm the decision of the District Court.

Dated: New York, New York
August 19, 1976.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-6075

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 16th day of July, 1976 she served a copy of the within page proof of Govt's brief and cy of Joint Appendix

by placing the same in a properly postpaid franked envelope addressed:

David Schoenbrod, Esquire
15 West 44th Street
New York, New York 10036

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian L. Bryant

Sworn to before me this
16th day of July, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977

(2)

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Robert B. Fiske, Jr.
UNITED STATES ATTORNEY
8/19/76
Marian L. Bryant